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COURT OF CRIMINAL APPEALS
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No. PD-0561-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/19/2020
DEANA WILLIAMSON, CLERK

JACOB MATTHEW JOHNSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Brazoria County

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STATE'S BRIEF ON THE MERITS

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Jacob Matthew Johnson.

*The case was tried before the Honorable Jerri Lee Mills, Presiding Judge, County Court at Law 1 and Probate Court, Brazoria County, Texas.

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JACOB MATTHEW JOHNSON, Appellant

v.

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* * * * *

STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Officers are permitted to approach civilians and engage in consensual interactions with them. The circumstances attendant to nearly all such encounters are not made coercive simply because an officer activates his emergency lights.

STATEMENT OF THE CASE

Appellant was approached by an officer in a park-and-ride lot around midnight. The officer smelled marijuana and arrested appellant for possession. Appellant pled guilty after the trial court denied his motion to suppress. The court of appeals reversed.[1] It disclaimed any application of a "*per se* rule" but did not explain what circumstances other than the use of emergency lights made the encounter a seizure.

[1] *Johnson v. State*, 602 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2020, pet. granted).

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant the State's request for oral argument.

ISSUES PRESENTED

1. **Is the use of overhead emergency lights, combined with factors common to most consensual encounters, sufficient to seize a parked vehicle?**

2. **If appellant was seized, was it reasonable?**

STATEMENT OF FACTS

The trial court issued findings of fact.[2] Other than the deletion of the trial court's citation to the record, they appear as follows:

1. The charged offense that is the subject of this case occurred on or about August 28, 2016.

2. Sergeant Robert Cox testified that he was on routine patrol around 12 AM.

3. Sergeant Cox further testified that as part of his routine patrol, he regularly checks the park and ride located at the intersection of FM 2004 and FM 523. He regularly spotlights vehicles parked overnight in that park and ride to deter drug activity and burglaries.

4. The park and ride at the intersection of FM 2004 and FM 523 is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. Sergeant Cox testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride.

5. While conducting his routine patrol on or about the day in

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[2] 1 CR 30-31.

question, Sergeant Cox spotted the defendant's vehicle parked in the park and ride and observed movement inside. Other vehicles were present in the park and ride and that defendant's vehicle was parked away from the other vehicles.

6. Sergeant Cox parked behind defendant's vehicle then turned on his overhead lights.

7. Sergeant Cox did not block the defendant's vehicle from leaving when he parked behind it.

8. Sergeant Cox then approached defendant's vehicle.

9. Once the defendant rolled down his window, Sergeant Cox observed the defendant's pants to be undone and detected the smell of marihuana.

10. A copy of Sergeant Cox's in-car video was offered but not admitted into evidence.

There are three minor problems with these findings.

First, Findings 2, 3, and 4 refer to the fact that Sergeant Cox (Cox) "testified" to a number of things. That is a "weasel word"[3] but, in context, it is apparent the trial court found that testimony credible.

Second, the first sentence in Finding 4, that the parking lot is a high-crime area, covers in a shorthand manner a few pages of supporting testimony the trial court apparently found credible. Cox was familiar with this park-and-ride lot.[4] He knew

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[3] *State v. Mendoza*, 365 S.W.3d 666, 671 (Tex. Crim. App. 2012) (explaining that there are some findings that reflect more what was said than what was found credible).

[4] 1 RR 15, 27 ("very familiar").

how it was lawfully used at that time of night—overflow parking for a nearby bar—and how unusual it was for people to sit in a car parked away from other cars.[5] He had been out there "a lot" over ten years in the county,[6] including on three of four "calls for service" in the months preceding this incident,[7] and knew it to be home to a variety of criminal activities including burglaries, drug crimes, and public lewdness.[8] That is why he spotlights the vehicles as he drives through.[9] Third, as pointed out by the court of appeals, the second sentence of Finding 4—Cox "testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride[,]"—is not supported by the record.[10] Cox said he responded to calls for service in that time frame but did not say he made any arrests.

SUMMARY OF THE ARGUMENT

When the proper record is viewed in the proper light, the only circumstance that suggests any show of authority was the officer's use of emergency lights to announce his identity and record the encounter. This Court has rejected the argument that such use is sufficient to transform an otherwise consensual encounter into a

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5 1 RR 27.

6 1 RR 16.

7 1 RR 17.

8 1 RR 16.

9 1 RR 18; 1 CR 30 (Finding 3).

10 *Johnson*, 602 S.W.3d at 59.

seizure. It should continue to do so. If appellant was seized, the officer had reasonable suspicion of criminal activity associated with that location.

ARGUMENT

I. Setting the record straight.

Whether an encounter with police was consensual requires viewing the totality of the circumstances.[11] This requires properly identifying them. The court of appeals failed to do this. The court of appeals acknowledged the findings of fact and their import,[12] but reviewed Cox's testimony *de novo*.[13] There is a lot wrong with this, in the abstract and in application.

I.A. The findings should be "the record."

When a trial court makes findings, all findings supported by the record should be considered *the* facts, *i.e.*, all the evidence the trial court found credible. A reviewing court should not set the findings aside and conduct its own review of the transcript, even in an effort to uphold an interlocutory ruling on any theory of law applicable to the case.[14] Regardless of the merits of re-imagining the trial court's

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[11] *State v. Garcia-Cantu*, 253 S.W.3d 236, 242 (Tex. Crim. App. 2008) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)).

[12] *Johnson*, 602 S.W.3d at 59.

[13] *Id*. at 58.

[14] *State v. Esparza*, 413 S.W.3d 81, 92-93 (Tex. Crim. App. 2013) (Keller, P.J., concurring). Even remand for additional findings might go too far. Four judges on this Court would, in the absence of objection by one of the parties, simply view evidence not included in the explicit findings (continued...)

credibility determinations to uphold its ruling, the practice has no place when reversing the trial court. That is what happened here.

I.B. The court of appeals considered the wrong record.

After listing the testimony it considered, the court of appeals summarized the context in which Cox used his emergency lights:

> Officer Cox's patrol car was in a parking lot around midnight with no cars in the area other than the car that Officer Cox was examining. After shining a spotlight into that car twice, Officer Cox stopped his marked patrol car within ten to fifteen yards of the other vehicle, turned on his overhead emergency lights, and approached the vehicle.[15]

"In this context," the court concluded,

> Officer Cox's use of the overhead emergency lights weighs in favor of concluding that a reasonable person would not have felt free to leave the Parking Lot or to ignore a request by Officer Cox to lower the car window[,] . . . [and] the evidence at the suppression hearing demonstrates that Officer Cox, through a show of authority, sufficiently conveyed the message that appellant was not free to leave the Parking Lot or to ignore a request to lower the car window.[16]

Many of the facts the court considered are not facts in the appellate sense. Although some differences are minor, some have the potential to (mis)shape the analysis.

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[14](...continued)
in the light most favorable to the ruling. *State v. Martinez*, 569 S.W.3d 621, 634 (Tex. Crim. App. 2019) (Newell, J., concurring).

[15] *Johnson*, 602 S.W.3d at 58.

[16] *Id*.

Some of the court of appeals's facts were supported by the record but omitted from the findings, like the markings on the patrol car[17] and the distance between it and appellant's vehicle.[18] Some departures from the findings are more serious because they undermine the trial court's findings and/or infer facts not supported by the record. For example, whereas the trial court found that appellant "parked away from the other vehicles[,]" the court of appeals said there were "no [other] cars in the area." The latter description suggests a level of isolation not supported by the record. Cox said there were "no other vehicles around [appellant's car],"[19] but that is consistent with his later testimony (and the findings) that the situation appeared out of the ordinary because there was a car sitting in a park-and-ride after midnight "[w]ith no other vehicle there to pick them up and give them a ride[.]"[20] Viewed in the proper light, Cox was not describing the absence of vehicles from some vague-but-presumably-large "area."

It is also possible to read the court of appeals's recitation as implying that the spotlight was part of the encounter. The record does not support that. The relevant findings mention the spotlight only to say that Cox "regularly spotlights vehicles

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17 1 RR 23.

18 1 RR 20, 25-26.

19 1 RR 18.

20 1 RR 27.

parked overnight in that park and ride to deter drug activity and burglaries."[21] The relevant testimony supports only what the findings say: Cox shined his spotlight "across the vehicle" as he was "scanning" "or doing a sweep" with it.[22] It may be inferred that the spotlight aided in spotting movement inside appellant's vehicle, but nothing in the findings suggests that the spotlight remained on appellant's vehicle after Cox parked behind it and activated his emergency lights.

Perhaps the biggest problem with the court of appeals's brief analysis is that it might suggest Cox asked appellant to lower his window. There is no evidence of any request. Cox testified that he approached, identified himself, "made contact with the defendant," and smelled marijuana "when the window came down."[23] No one asked Cox whose idea it was to lower the window. To be clear, at no point does the majority cite testimony to that effect, and a careful reader will spot that the court's two conclusions refer to "a" request to lower the window rather than "the" request.[24] If that was meant as an illustration, further clarification would have helped.

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[21] 1 CR 30 (Finding 3) (Cox "regularly spotlights vehicles parked overnight in that park and ride to deter drug activity and burglaries.").

[22] 1 RR 18 ("As I shined my spotlight across the parking lot, across the vehicle . . ."), 21 ("I come through and come up this way and I'm scanning with my spotlights and I see this vehicle . . ."), 25 ("I was coming through the middle of the -- of the park-and-ride with my spotlight prior (sic) scanning the vehicles . . ."), 26 (agreeing that he was "headed down the middle doing a sweep with the spotlight.").

[23] 1 RR 18, 22.

[24] *Johnson*, 602 S.W.3d at 58.

I.C. Appellant is responsible for any gaps in the record.

In light of the discrepancies between the findings and the testimony (and inferences) considered by the court of appeals, it is important to remember who is responsible for the record. If there are aspects of the testimony that were not fully developed or translated into findings, the losing party is to blame. In this case, appellant's near-exclusive focus on emergency lights explains any gaps in the record.

Appellant began by asking the State to stipulate, *inter alia*, that he was seized when the overhead lights were activated.[25] He also objected to the relevance of anything after Cox activated his emergency lights and approached because "he's already made the seizure at this point."[26] Appellant later objected (successfully) to the admission of the video of the encounter on the same basis.[27] He detailed this argument during his objection, and again during closing argument.[28]

On appeal, appellant blamed the absence of evidence on the trial court's agreement with the substance of his objection to the video. "If that had not occurred, then the trial court and this court would have the benefit of the video and any additional cross-examination or direct examination of defense witnesses regarding the

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[25] 1 RR 10. The State declined.

[26] 1 RR 18-19.

[27] 1 RR 28-29.

[28] 1 RR 29-30, 35-36, 46.

circumstances of the encounter."[29] But the record—the testimony and the findings—was his responsibility. He, and the court of appeals, should be bound by them.

II. Appellant had a consensual encounter.

Reviewing the proper facts in the proper light shows that the only circumstance that suggests a show of authority was the use of emergency lights. Because that circumstance cannot turn a consensual encounter into a seizure on its own, appellant was not seized.

II.A. Standard of review

A trial court's ruling on a motion to suppress is reviewed for abuse of discretion with almost total deference given to the trial court's determination of historical facts.[30] However, the question of whether a given set of historical facts amounts to a consensual police-citizen encounter or a detention under the Fourth Amendment is subject to *de novo* review.[31]

II.B. The focus is on police conduct.

"The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation."[32] In order to obtain that voluntary cooperation,

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[29] App. Br. at 17-18.

[30] *Garcia-Cantu*, 253 S.W.3d at 241.

[31] *Id*.

[32] *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

"[p]olice officers may be as aggressive as the pushy Fuller-brush man at the front door, the insistent panhandler on the street, or the grimacing street-corner car-window squeegee man."[33] The test for when the officer goes too far has two parts. First, there must be a "display of official authority and the implication that this authority cannot be ignored, avoided, or terminated."[34] Second, the civilian must submit to that display of authority.[35]

The framework changes slightly when police approach a stationary civilian. "[W]hen an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not."[36] When, as in this case, a civilian had no apparent desire to leave prior to the officer's approach, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[37] The Supreme Court explained why in *Florida v. Bostick*, in which Bostick was a passenger on a bus waiting to depart when the officer boarded:

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[33] *Garcia-Cantu*, 253 S.W.3d at 243.

[34] *Id*.

[35] *Wade v. State*, 422 S.W.3d 661, 669 (Tex. Crim. App. 2013) (citing *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991)).

[36] *Brendlin v. California*, 551 U.S. 249, 255 (2007).

[37] *Bostick*, 501 U.S. at 436.

> [T]he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.[38]

That court likened the situation to the workers in a factory visited by INS, whose lack of freedom to leave their worksite was explained "'not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers.'"[39]

Although courts must consider all the circumstances surrounding the encounter, the primary focus is on the officer's conduct.[40] "The test . . . is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation."[41] No one factor is dispositive; there are no "*per se*" circumstances.[42] Importantly, the "reasonable person" contemplates an innocent person.[43]

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[38] *Id*.

[39] *Id*. (quoting *I.N.S. v. Delgado*, 466 U.S. 210, 218 (1984)).

[40] *Id*. at 439; *Garcia-Cantu*, 253 S.W.3d at 243-44.

[41] *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

[42] *United States v. Drayton*, 536 U.S. 194, 201 (2002); *Garcia-Cantu*, 253 S.W.3d at 243.

[43] *Garcia-Cantu*, 253 S.W.3d at 243 (citing *Bostick*, 501 U.S. at 438).

II.C. None of the other circumstances in this case support seizure, alone or in context.

Because the court of appeals's analysis is conclusory, it is unclear how much weight was assigned to each of the circumstances it set out. Examination of everything mentioned shows the only one that could be viewed as authoritative was Cox's use of his emergency lights. The rest are either inherent to all encounters, add little to the analysis, or support the trial court's ruling.

II.C.1. Police drive police cars.

Cox was driving a patrol car. Even if the term "patrol car" presumes it was marked, this fact means virtually nothing. As the Supreme Court has explained, the officer's appearance has "little weight" in the analysis:

> Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.[44]

The same must be true of marked police cars. The fact that a patrol car is easily identifiable is unlikely to contribute to the coerciveness of an encounter with someone the person knows is an officer.

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[44] *Id*. at 204-05.

II.C.2. Appellant was not physically prevented from driving away.

Cox parked his patrol car so as not to block appellant from leaving. Had Cox done otherwise, the trial court's ruling likely would have been different.[45] This favors consent. The testimony not included in the findings (but considered by the court of appeals) is even better; a 45-foot buffer is all that can be reasonably asked of an officer who exits a vehicle to approach a civilian.

II.C.3. Of course there was an approach.

Cox walked over to appellant's vehicle. As the Supreme Court made clear in the seminal *Florida v. Royer*, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place" and asking to engage in conversation.[46] Considering the alternative shows that viewing an officer's approach as evidence of seizure is absurd. Had Cox told appellant to exit his vehicle and approach him, this would have been an easy case of seizure.[47] It cannot be that the choice not to order (or even request) that appellant

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[45] *See Garcia-Cantu*, 253 S.W.3d at 246 n.44 (collecting cases on the effect of blocking).

[46] *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality); *id*. at 523 n.3 (Rehnquist, J., dissenting).

[47] *Wade*, 422 S.W.3d at 670 ("We agree with the State that appellant was not 'seized' until he complied with Warden Campbell's order to get out of his truck for a frisk."); *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010) (shining a patrol car's overhead lights in the appellant's direction coupled with a "request that sounded like an order to 'come over here and talk to me'" was a seizure upon appellant's acquiescence); *Garcia-Cantu*, 253 S.W.3d at 243 ("Likewise, the encounter becomes a seizure if the officer orders the suspect to 'freeze' or to get out of the car.") (quoting 4 Wayne R. LaFave, Search and Seizure § 9.4(a), at 433-35 (4th ed.2004)).

come to the officer also favors seizure. Finally, if one goes outside the findings, as the court of appeals did, the record shows that Cox approached cautiously, not aggressively or authoritatively.[48]

II.C.4. Cox did not ask appellant to do anything.

This case is unusual because there is no evidence that Cox asked appellant to do anything. As far as the record is concerned, Cox smelled marijuana because appellant decided to roll down his window. So not only is this a case of passive acquiescence rather than a literal stop, it is a case of unsolicited action that revealed a crime. If the record were viewed in the light most favorable to appellant, that level of cooperation could be excused as compliance with what would inevitably be the next step in the stop—a perfectly permissible request to "encourage [the occupant of a vehicle] to eliminate any barrier to conversation."[49] But the record is viewed in the light most favorable to the ruling. In the absence of a command or even an authoritative tone, appellant's unilateral decision to roll down the window suggests free will.

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[48] 1 RR 18; *Johnson*, 602 S.W.3d at 58.

[49] *Garcia-Cantu*, 253 S.W.3d at 243 (quoting LaFave at 433-35).

II.C.5. Time of day should not matter much.

This leaves the circumstances other than the officer's conduct or appearance. Although all circumstances must be considered, and some could impact the analysis in a given case, nothing about the time, location, or lack of other people on the scene in this case suggests a seizure rather than consensual encounter.

This Court has said "[i]t is a reasonable inference that the objectively reasonable person would feel freer to terminate or ignore a police encounter in the middle of the day in a public place where other people are nearby than he would when parked on a deserted, dead-end street at 4:00 a.m."[50] It is unclear that time of day played a significant role in either the case that first said it or the one that applied it.[51] It is also unclear why circumstances beyond the officer's control—like time of day—should impact an analysis based primarily on his conduct.

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[50] *State v. Castleberry*, 332 S.W.3d 460, 468 (Tex. Crim. App. 2011) (quoting *Garcia-Cantu*, 253 S.W.3d at 245 n.42).

[51] Based on the in-text explanation *vel non* of the circumstances and the brief analysis following them, the outcome in *Garcia-Cantu* turned on the fact that the officer blocked Garcia-Cantu's egress with his patrol car and used his physical presence, a commanding tone, and his flashlight to control Garcia-Cantu and his passenger. 253 S.W.3d at 244-49. In fact, Presiding Judge Keller and Judges Keasler and Hervey disagreed with the relevance of time of day when *Garcia-Cantu* was decided. *Garcia-Cantu*, 253 S.W.3d at 251 (Keller, P.J., dissenting) ("As any private citizen may do, a police officer may approach an individual at any time of the day and ask questions."). *Castleberry* reiterated that it is the officer's conduct that "is a determinative factor in deciding whether an interaction was a consensual encounter or Fourth Amendment seizure." 332 S.W.3d at 468. It went on to consider the time, place, and surrounding circumstances of the interaction, but it did so collectively and found nothing coercive about a well-lit encounter at 3:00 a.m. with "quite a bit" of foot traffic. *Id*.

In fairness, reasonable suspicion of criminal activity sometimes increases the later it gets because it coincides with opportunity or lack or innocent explanation.[52] However, effectiveness of consent does not vary inversely with reasonable suspicion. That would not only conflict with the presumption that the reasonable person is an innocent one, it was rejected by the Supreme Court in *Drayton*.[53]

Time of day may not be irrelevant, but it should be the unusual case in which an innocent person's feeling about a police encounter depends on what shift an officer works. This is not an unusual case.

II.C.6. There is nothing special about parking lots.

Although the area where an encounter takes place is one of the circumstances that must be considered, it is also unrelated to officer's conduct. Regardless of the weight it might carry in a given a case, there is no authority for the idea that parking lots hold any special significance under the Fourth Amendment. That is evident in this case, where appellant parked his vehicle and had the intent to remain there. Even

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[52] *See*, *e.g.*, *Foster v. State*, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010) (time of day relevant to suspicion of DWI); *Gurrola v. State*, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994) ("Furthermore, a residential parking lot in the late afternoon does not give rise to the same suspicions as does an empty department store parking lot at 1:30 a.m."). *Cf. Illinois v. Wardlow*, 528 U.S. 119, 129 (2000) (factors like time of day "might be relevant in specific cases" to the inference to be drawn from a person's flight).

[53] 536 U.S. at 207-08 ("It would be a paradox, and one most puzzling to law enforcement officials and courts alike, were we to say . . . that Drayton's consent was ineffectual simply because the police at that point had more compelling grounds to detain him [than his arrested companion].").

had he been on a bus instead of in a public parking lot, his presence would have been "the natural result of choosing to [be there]; it says nothing about whether the police conduct is coercive."[54]

Appellant was parked in a public parking lot because he chose to be. That does not reasonably make the encounter less consensual.

II.C.7. It really does not matter who else was around.

In narrow circumstances, like in the close confines of a bus, the presence of other people might be a factor favoring effective consent.[55] In the average case, however, it means very little either way to change the reasonable interpretation of an officer's conduct. This is an average case. Again, appellant was where and with whom he wanted to be. To the extent "parked away from the other vehicles" implies significant distance, Appellant's decision to isolate himself and his passenger should not serve to make his acquiescence or unilateral conduct more coerced.

II.D. The use of emergency lights was the only noteworthy circumstance.

In the absence of a command or even a request, the court of appeals was left with appellant's decision to remain as a show of acquiescence to authority. That does not work unless one concludes that emergency lights alone effectuated a seizure.

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[54] *Id*. at 201-02.

[55] *Id*. at 204 ("a reasonable person may feel *even more* secure in his or her decision not to cooperate with police on a bus than in other circumstances.") (emphasis added).

Reviewing these circumstances shows that none of them suggest appellant was seized. This is not to say that the analysis should be decided by determining their weight in isolation; divide and conquer should be as disfavored when the State does it as when an appellant or court of appeals does it. But it is important to recognize that factors intrinsic to most encounters have no practical value. The circumstances that truly matter are those that can help turn a simple introduction by a uniformed officer into an inexorable command to stay put. None are present in this case.

As in *Drayton*, "There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."[56] In short, this was as vanilla an encounter as can be imagined—with the exception of emergency lights.

II.E. Emergency lights are not enough.

As noted in *Garcia-Cantu*, many jurisdictions have concluded that the use of flashing emergency lights effectively creates a seizure.[57] Most, like the concurrence in this case, characterize such lights as "unequivocally an instruction to 'stop' and thus an instruction to not leave."[58] This Court has wisely resisted joining those

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[56] *Id*.

[57] *Garcia-Cantu*, 253 S.W.3d at 245 n.43.

[58] *Johnson*, 602 S.W.3d at 65 (Hassan, J., concurring).

jurisdictions because there is a general rule against *per se* rules in this context. But it is also factually inaccurate to say emergency lights only ever mean "stop."

Professor LaFave suggested that using flashing lights "as a show of authority" would likely convert the event into a seizure.[59] That qualification is the key. When, as in an evading arrest case, the lights are used as a show of authority, it makes sense to view them that way.[60] Had appellant fled and been charged with evading, the facts of this case would support appellant's knowledge: Cox parked his patrol car near a single vehicle, activated his emergency lights, and approached. There would be no reasonable doubt that Cox was focused on appellant and that appellant knew Cox was a peace officer.

But this is not a review of the evidence in the light most favorable to an evading conviction, and emergency lights have different significance in different contexts. Their use in this case is distinct from their use in a high speed chase, or combined with a drawn firearm and the command to exit the vehicle. Cox activated his emergency lights to activate his recording devices and "so nobody shoots me."[61] It is why an officer in another case from this Court activated his lights when

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[59] *Garcia-Cantu*, 253 S.W.3d at 243 (quoting LaFave at 433-35).

[60] TEX. PENAL CODE § 38.04(a) ("A person commits an offense if he intentionally flees from a person he knows is a peace officer . . . attempting lawfully to arrest or detain him.").

[61] 1 RR 20, 27-28.

approaching a vehicle he did not stop.[62] This is a well-known practice the court of appeals recognized.[63] Context matters.

If there are no *per se* rules, and emergency lights are not inexorably authoritative, then adding them to circumstances that are either present in every encounter, negligible, or favor consent cannot result in a seizure. The totality of the circumstances do not suggest a reasonable person would have felt compelled to remain (or spontaneously roll down his window).

III. Sergeant Cox had reasonable suspicion to detain appellant.

If appellant was seized by the use of emergency lights, with or without whatever other circumstances this Court says supports that conclusion, that seizure was justified by reasonable suspicion of criminal activity associated with the lot.

III.A. Reasonable suspicion of something criminal is a low hurdle.

The Fourth Amendment permits an officer to temporarily seize a person to investigate the possibility "that criminal activity may be afoot."[64] All that is required is reasonable suspicion. Reasonable suspicion exists when an officer has "specific,

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[62] *See Gonzales v. State*, 369 S.W.3d 851, 853 (Tex. Crim. App. 2012) (the officer in a community care-taking case "activated both his front-facing and rear-facing overhead red and blue lights to notify Gonzales that it was the police and not 'some bad guy' who had pulled in behind him.").

[63] *Johnson*, 602 S.W.3d at 58 ("[A] police officer might activate the overhead emergency lights for safety purposes, to avoid getting hit by passing cars or causing an accident.").

[64] *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity."[65] "Unlike the case with probable cause to justify an arrest, it is not a *sine qua non* of reasonable suspicion that a detaining officer be able to pinpoint a particular penal infraction."[66]

As with the consent analysis, the record should be viewed in the light most favorable to the trial court's ruling, beginning with its findings of fact. More specifically, a reviewing court must give "due weight" to factual inferences drawn by local judges and law enforcement officers.[67] With regard to an officer's testimony, a reviewing court errs "by requiring extensive details of an officer's training and experience as a predicate for showing that an officer is capable of reasonably making inferences and deductions based on that training and experience."[68] "As long as there is some evidence in the record to support the trial court's implied finding that the officer was reasonably capable of making rational inferences and deductions by drawing on his own experience and training, the State does not have an additional

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[65] *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 36 (Tex. Crim. App. 2017) (cleaned up).

[66] *Derichsweiler v. State*, 348 S.W.3d 906, 916 (Tex. Crim. App. 2011). *See id.* at 917 (permitting seizure to confirm or dispel the officer's suspicion "that *something* of an apparently criminal nature is brewing") (emphasis in original).

[67] *Ramirez-Tamayo*, 537 S.W.3d at 36.

[68] *Id*. at 37.

burden to include extensive details about the officer's experience and training[.]"[69] Instead, appellate courts should defer to the trial court's implicit findings that the officer was credible and "had adequate training and experience to reliably assess whether the otherwise seemingly innocent circumstances . . . were suspicious[.]"[70]

III.B. Appellant reasonably looked like he was doing something criminal.

Consideration of all the evidence in the proper light shows appellant reasonably appeared to be in a high-crime area committing one of those crimes.

III.B.1. He was in a place known for specific crimes.

The court of appeals appears to have accepted that the park-and-ride is a high-crime area. However, it rejected the idea that it is home to the offenses testified to by Cox and found by the trial court. That was a mistake.

The trial court found that the park-and-ride is a high-crime area for specific offenses based on Cox's testimony—burglaries of motor vehicles, drug crimes, and public lewdness. The court of appeals disregarded the specificity of the trial court's finding, *i.e.*, the types of crimes committed there, for several reasons, including:

- The trial court's finding that Cox made arrests there in the preceding months was inaccurate.
- Cox did not identify the nature of the service calls he responded to in that period or if he made any arrests.

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[69] *Id*.

[70] *Id*.

- Cox did not testify that he made any arrests there for the offenses he said occur there: burglary of a motor vehicle, a drug crime, or public lewdness.
- Cox never specified how many of these criminal offenses had occurred there.
- Cox did not explain whether his many trips out there were part of his patrol duties or whether he had been called there as a result of possible criminal activity.
- Cox did not say it was a high crime area.[71]

Based on its analysis, and notwithstanding the last bullet point, the court of appeals appears to have accepted the fact that the lot is a high-crime area generally.[72] And it apparently considered Cox's testimony that there were burglaries of motor vehicles, drug crimes, and public lewdness committed there.[73] But it drew the line at it being a high-crime area *because* of those offenses.

The court of appeals was right to accept the finding that the park-and-ride is a high-crime area. It was wrong to disregard the finding that the park-and-ride was home to the offenses testified to by Cox. The error is analogous to what the court of appeals did in *Ramirez-Tamayo*. In that case, the officer testified that, when a person stopped for a traffic violation opens the door instead of rolling down the window, it

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[71] *Johnson*, 602 S.W.3d at 59-60.

[72] *Id.* at 61 (including that factor in its comparison to the case it distinguished).

[73] *Id*. at 60 (including it in its summary of Cox's testimony).

suggests the door is full of narcotics.[74] He based this belief on his "training and experience" and because he had seen it "a few times."[75] The court of appeals said that testimony could not be considered because the training and experience had not been sufficiently detailed or quantified.[76] This Court disagreed. It concluded that the officer's claim of training and experience is just as much a fact subject to credibility determinations and deference as any other testimony.[77]

The court of appeals should have considered not only that the park-and-ride was a high-crime area but that burglary of a motor vehicle, drug crimes, and public lewdness make it so.

III.B.2. He acted consistently with those crimes.

An individual's presence in a high-crime area is not enough on its own to justify a temporary seizure.[78] But Cox did not approach merely because appellant was present. He approached because he spotted two people moving in a vehicle in a park-and-ride with no other vehicle nearby. This suggested they were not there to share a ride or to either enter the nearby bar or go home. And, although suspicion of a

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[74] *Ramirez-Tamayo*, 537 S.W.3d at 37.

[75] *Id*.

[76] *Ramirez-Tamayo v. State*, 501 S.W.3d 788, 795-96 (Tex. App.—Amarillo 2016).

[77] *Ramirez-Tamayo*, 537 S.W.3d at 37.

[78] *Wardlow*, 528 U.S. at 124.

specific offense is not required, the circumstances also suggested all of the offenses Cox associated with the lot.

The two occupants could have been burglars who picked a vehicle parked away from others to give them the greatest opportunity to work. They could have "parked away" from the other cars present in a public parking lot to engage in lewd behavior. Finally, they might have wanted some privacy to use drugs outside their homes.

Based on his training and experience generally and with the parking lot, it would have been reasonable for Cox to temporarily detain the occupants to quickly confirm or dispel these reasonable suspicions.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's conviction.

Respectfully submitted,

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The undersigned hereby certifies that on this 16th day of September, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

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